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2010 APPELLATE CASES FROM THE DEFENSE PERSPECTIVE

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2010 APPELLATE CASES –

FROM A DEFENSE PERSPECTIVE

**By James P. Cleary, Deputy Legal Defender, Maricopa County,
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I. Substantive Criminal Law

State v. Carrillo, 224 Ariz. 463, 232 P.3d 1245 (2010)

The Court reviewed a decision of the court of appeals (division 1) interpreting A.R.S. 13-1321, the implied consent law. The court of appeals held that the statute does not allow a warrantless blood draw absent a suspect's "express" agreement by affirmative or unequivocal words or conduct. It further held that consent to a blood draw could not be inferred from a mere failure to communicate clear objection to the test.

The Court upheld the court of appeals. It concluded that the legislature's intent was to impose administrative sanctions, i.e. suspension of driving privileges, rather than authorize warrantless seizures of blood evidence from a DUI suspect when consent for a blood test was not provided by a suspect. The case was remanded to the trial court for a determination whether the defendant "expressly agreed" to a blood draw.

State v. King, 225 Ariz. 87, 235 P.3d 240 (2010)

The Court reviewed a decision of the court of appeals (division 2) which held that under A.R.S. 13-404 (A) a defendant was not entitled to a self-defense instruction because he had not presented sufficient evidence that he had acted *solely* from fear of immediate physical danger in response to a victim's assaultive behavior. The court of appeals

disagreed that the sole motivation factor was required by the statute, but felt constrained by precedent which indicated that sole motivation was a necessary requisite for a self defense instruction.

The Court vacated the court of appeals decision. It held that a self defense instruction was not dependent on whether the defendant's actions were solely motivated from fear. The Court held the statute required the fact-finder to determine whether objectively, under all the circumstances, whether a reasonable person in the defendant's position would believe the defendant's actions were justified. The sole motivation requirement was disapproved and the Court disapproved of language and holding from other cases that held otherwise.

State v. Young, 223 Ariz. 447, 224 P.3d 944 (CA 1 2010)

The court of appeals reviewed defendant's conviction for computer tampering under A.R.S. 13-2316 (A)(7). At issue was whether the defendant's access to and retrieval of information from a state computer at his place of employment (ADOT) listing job performance evaluation scores of other ADOT employees was information that was confidential or not public records.

The court reversed defendant's conviction. It held that the information was not necessarily confidential as the evidence at trial was insufficient to demonstrate that the specific files accessed were in fact confidential. Further, the court held that there is a presumption that records and information held in state custody are public records subject to disclosure. It found that the records at issue fell within the definition of a public record.

State v. Rios, 225 Ariz. 292, 237 P.3d 1052 (CA 1 2010)

The court of appeals reviewed defendant's second-degree murder conviction. At trial the defendant had urged the court, under AR.S. 13-205, to instruct the trial jury that the state had the burden to disprove justification defenses beyond a reasonable doubt. The trial court declined as the statute at the time of defendant's trial and request had not

been ruled retroactive to his case. Therefore, he was required to prove his justification defense by a preponderance of the evidence.

The court reversed the defendant's conviction. It found that while the defendant's case was pending on appeal the legislature had amended the bill imposing the burden on the state to disprove justification beyond a reasonable doubt to apply retroactively to cases like defendant's where a guilty plea or no contest plea or a trial had not reached a verdict at the time of the original amendment imposing the burden on the state to disprove justification. Finally, the court concluded that the retroactive amendment was not a violation of Separation of Powers as the matters were clearly within the domain of the legislature i.e. defining criminal conduct, limited nature of the enactment, shifting the burden of proof, and little or limited impact of the amendment on actual cases.

State v. Hinden, 224 Ariz. 508, 233 P.3d 621 (CA 2 2010)

The court reviewed defendant's conviction for burglary of a "fenced commercial yard" under A.R.S 13-1501(4) and 13-1506(A) (1). The evidence at trial showed the area where defendant was observed was no longer a business and the property was going to be sold.

The court reversed defendant's conviction. It held that the statutes defining "fenced commercial yard" were in the present tense and therefore required that a burglary conviction could not be obtained if the commercial yard is not being used for some business purpose at the time of the illegal entry.

Los Angeles County, California v. Humphries, ___ U.S. ___, 131 S.Ct. 447 (2010)

Individuals were charged with child abuse and felony torture in California. Subsequently, the charges were dismissed as it was determined that the individuals were "factually innocent." However, under California law the individuals were still listed on California's Child Abuse Central Index (CACI) as being arrested and charged for the child abuse and felony torture. The individuals sought declaratory and

injunctive relief under 42 U.S.C. sec. 1983 to require the state to delete and purge from the CACI records the listed arrests and charges.

The United States Supreme Court held that under Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), individuals may seek prospective, non-monetary relief for alleged injuries caused by a municipal policy or custom. It found that the individual's sec. 1983 claims were not precluded due to the mere fact that monetary damages were not being sought. Sec. 1983's legislative history clearly allowed for equitable or other proper proceedings for redress.

II. Procedural Criminal Law

State v. Geeslin, 223 Ariz. 553, 225 P.3d 1129 (2010)

The Court reviewed a court of appeals (division 1) decision to not review a jury instruction claim of error. The court of appeals held that the absence of a proposed instruction in the record precluded review on appeal.

The Court remanded with directions that the court of appeals review and address the claimed error. At issue was whether unlawful use of a means of transportation could be a lesser included offense of theft of a means of transportation. The Court held that the trial court's refusal to so instruct was all Rule 21.3, Ariz. R. Crim. Pro., required for review on appeal. The absence of a proposed instruction did not preclude review.

State v. Aguilar, 224 Ariz. 299, 230 P.3d 358 (CA 1 2010)

The court of appeals reviewed a trial court's denial of a motion for new trial premised upon juror misconduct under Rule 24.1 (C) (3) (i), Ariz. R. Crim. Pro. In an attempted murder in the first degree trial, during deliberations, jurors discussed internet research brought to the deliberation by jurors on the issue of "premeditation."

The court reversed the denial of a new trial. The court concluded that the internet research was inconsistent with the court's instructions. It

found the error was not harmless in view of Arizona precedent that clearly and precisely define the meaning of premeditation that a juror needs to consider in deciding whether the facts show premeditation.

State v. Roper, 225 Ariz. 273, 236 P.3d 1220 (CA 1 2010)

The trial court precluded the state from introducing DNA evidence in a misconduct involving weapons prosecution. It held that the state had not complied with disclosure requirements under Rule 15, Ariz. R. Crim. Pro. Consequently, the preclusion order was entered under Rule 15.7(a) (1), Ariz. R. Crim. Pro., as a sanction. The state dismissed the prosecution and appealed.

The court of appeals dismissed the appeal. It held that it did not have jurisdiction on an appeal from an order precluding evidence as a Rule 15 disclosure sanction. In so holding, the court agreed with division two and its similar holding in **State v. Bejarano**, 219 Ariz. 518, 200 P.3d 1015 (CA2 2008).

Rivera-Longoria v. Slayton, 225 Ariz. 572, 242 P.3d 171 (CA 1 2010)

The court of appeals reviewed a trial court's refusal to preclude evidence not disclosed under Rule 15, Ariz. R. Crim. Pro., within 30 days of a plea deadline. The trial court held there was no plea deadline that implicated the sanctions provisions of Rule 15.8, Ariz. R. Crim. Pro.

The court of appeals found that under the facts of the case the prosecution had withdrawn an offer that was initially rejected by the defendant. This was tantamount to a "deadline" which would trigger the sanctions provisions if additional disclosures were made after the plea "deadline." Consequently, the subsequent disclosure of approximately 11,000 pages of discovery after the "deadline" could require preclusion. The case was remanded for a determination of whether the defendant's rejection of the plea was impacted by the non-disclosure of the 11,000 pages of discovery within 30 days of the plea "deadline."

Potter v. Vanderpool, 225 Ariz. 495, 240 P.3d 1257 (2010)

The court of appeals reviewed a superior court ruling declining Rule 11, Ariz. R. Crim. Pro., competency proceedings after a justice court had ordered full competency proceedings pursuant to Rule 11.2, Ariz. R. Crim. Pro., after a report of a mental health professional had recommended full competency proceedings. The superior court found no basis for the full competency proceedings upon its own review of the order and report of the mental health professional.

The court remanded the cases for full Rule 11 proceedings as initially ordered by the justice court. It held that Rule 11.2, Ariz. R. Crim. Pro., did not allow for review by a superior court of a justice court order for competency proceedings. Rather, the plain language of the rule allowed a limited jurisdiction court the authority to make a determination that competency proceedings should be authorized and to order that such proceedings occur in superior court.

III. Evidentiary Criminal Law

State v. Sweeney, 224 Ariz. 107, 227 P.3d 868 (CA 1 2010)

The court of appeals reviewed a trial court's denial of a motion to suppress evidence in a drug transportation prosecution. The trial court found the continued detention of defendant, after a vehicle stop, for a canine sniff for drugs was reasonable under the Fourth Amendment.

The court of appeals reversed the trial court. The court reasoned that while the initial detention of defendant and his vehicle was reasonable for a traffic violation, it concluded that continued detention, for the purpose of a canine sniff search of the vehicle, was unreasonable. It found that the factors cited by the trial court, i.e. drug courier profile, were incompatible with evaluation based on objective reasonable suspicion to warrant a detention under the Fourth Amendment.

State v. Olm, 223 Ariz. 429, 224 P.3d 245 (CA2 2010)

The court of appeals reviewed a trial court order suppressing evidence in a theft and chop shop prosecution. It upheld the trial court's suppression order.

The court found that a police seizure of defendant's vehicle, based upon a bent VIN tag on the vehicle observed when police entered defendant's yard, was a seizure from the curtilage of defendant's residence. Since the seizure was without a warrant, and the police had no ability to view the interior of the vehicle for a bent VIN plate (supposed evidence associated with chop shop operations) without being on the property illegally, the suppression order was proper.

State v. Machado, 224 Ariz. 343, 230 P.3d 1158 (CA 2 2010); *upheld on review*, 2/16/2011.

The court of appeals, and ultimately the Supreme Court on review, examined defendant's conviction for second degree murder. Both courts concluded that the trial court erred in precluding third party culpability evidence proffered by the defendant in his defense.

The Supreme Court held that evidence of another suspect's violent acts and admission of responsibility for the murder was not subject to exclusion under Rule 404 (b), Ariz. R. Evid. Rather, third party culpability evidence admission is governed by application of Rules 401, 402 and 403, Ariz. R. Evid. Consequently, the proffered evidence from defendant of a third party's confession to the murder and ensuing police investigation, and that same party's instances of violent misconduct should have been allowed as it was relevant, non-prejudicial and was not confusing as to the issues in the case.

State v. Rumsey, 225 Ariz. 374, 238 P.3d 642 (CA 2 2010)

The court of appeals on review of a defendant's vehicular manslaughter conviction found that the defendant's right to counsel was violated in the post-accident police investigation. It determined that

defendant's request to consult with counsel during the time a blood sample was sought did not inhibit or otherwise impede the police investigation. However, it concluded that since a warrant was secured for the defendant's blood draw the right to counsel violation was not a basis to dismiss the prosecution.

State v. Blakley, ____ Ariz. ____, 243 P.3d 628 (CA 2 2010)

The court of appeals reviewed a trial court's denial of a suppression motion by a defendant in a possession of marijuana for sale prosecution. The trial court held that the defendant's consent to the search of his garage, where marijuana was stored, was not tainted by the police illegal entry into defendant's semi-private driveway.

The court of appeals reversed. It concluded that the driveway portion at issue was within the home's curtilage and an expectation of privacy existed. The police presence was for investigation and no warrant had been secured to justify their presence. Consequently, the consent to search was ineffective to remedy the illegal entry. Suppression of the seized marijuana was appropriate.

Doody v. Schriro, 596 F.3d 620 (9th Cir. 2010)

The Ninth Circuit Court of Appeals, in a habeas corpus proceeding, reviewed defendant's Arizona state court convictions for nine murders in Phoenix in 1991. The court examined the circumstances surrounding the defendant's apprehension, interrogation and incriminating statements secured from defendant. The court granted habeas relief.

The court determined that the *Miranda* warnings given to the seventeen year old defendant were deficient to fully apprise him of his constitutional rights. It further determined that the entire circumstances of his detention and interrogation by police (thirteen hours of relentless overnight questioning of a sleep deprived teenager by a tag team of officers) overbore his will rendering his statements involuntary.

The Ninth Circuit decision was summarily vacated by the United States Supreme Court on October 12, 2010. The case was remanded to the Ninth Circuit for reconsideration in view of the Supreme Court's decision in Florida v. Powell, 559 U.S. ___, 130 S.Ct. 1195 (2010).

IV. Sentencing Decisions

State v. Gunches, 225 Ariz. 22, 234 P.3d 590 (2010)

The Court reviewed defendant's conviction and sentence in a capital murder prosecution. It upheld the defendant's conviction but remanded for a new penalty phase proceeding.

The Court found the evidence was insufficient to establish the alleged capital aggravator of especially heinous or depraved under A.R.S. 13-751 (F) (6). The court determined that the evidence of defendant's "vile state of mind" was lacking. The error was not harmless as to the death sentence imposed, thus requiring a remand for a new penalty phase proceeding.

State v. Lynch, 225 Ariz. 27, 234 P.3d 595 (2010)

The court reviewed defendant's conviction and sentence in a capital murder prosecution. It upheld the defendant's conviction but remanded for a new penalty phase proceeding.

The Court found error in the trial court's penalty phase jury instructions. The trial court had instructed the jury that the (F) (6) aggravator, especially heinous, cruel or depraved, had been found as to each of the three aspects. It went on to instruct the trial jury that it should consider each as a separate aggravator in its determination whether a sentence of death was warranted. This was error as even though the aggravator is phrased in the disjunctive, it is only one aggravator for sentencing consideration purposes. The court concluded the error was not harmless as the jury may have attached more significance to the aggravator as three as opposed to only one.

State v. Snelling, 225 Ariz. 182, 236 P.3d 409 (2010)

The Court reviewed defendant's conviction and sentence in a capital murder prosecution. The court upheld the conviction but vacated the death sentence.

The court concluded that under the facts the cause and manner of death, strangulation by a single ligature, was not especially cruel. Since especially cruel was the only aggravator found by the jury, then a sentence of death was not possible as the defendant was not eligible for a sentence of death without any aggravators proven. The death sentence was vacated and defendant was sentenced to natural life imprisonment by the court.

State v. Lewis, 224 Ariz. 512, 233 P.3d 625 (CA 1 2010); upheld on review, 1/13/2011, 599 Ariz. Adv. Rep.12

The court of appeals, and the Supreme Court on review, upheld the trial court's early termination of defendant's probation as unsuccessful. The Court held that A.R.S. 13-901 (E) allows early termination of probation in a court's discretion. The mere non-payment of all fines, penalties or restitution should not preclude early termination if the probationer's conduct warrants early termination.

Jacobsen v. Lindberg, 225 Ariz. 318, 238 P.3d 129 (CA 1 2010)

The court reviewed a trial court's order requiring a sex offender probationer to undergo periodic polygraph examinations as to his behavior, past and present, as a condition of his probation. The trial court had granted the probationer limited immunity from prosecution under A.R.S. 13-4066 in order to mollify the defendant's Fifth Amendment self-incrimination concerns.

The court on review found that the order for polygraphs and attendant questioning would require the probationer to waive his self-incrimination rights under the Fifth Amendment. It further concluded that any limited immunity imposed was insufficient to provide full

protection of his self-incrimination rights. Consequently, the order for polygraph examinations and attendant questioning was set aside.

State v. Unkefer, 225 Ariz. 430, 239 P.3d 749 (CA 1 2010)

Defendant challenged a criminal restitution order entered by the court some twelve years after his sentence of imprisonment had been served. The order related to restitution originally imposed as a result of his conviction for a fraudulent scheme in 1988. The trial court denied any hearing on the delay in imposition of the order.

On review the court of appeals did not find the order unreasonable. However, it remanded for a hearing to determine whether, equitably, the twelve year delay was justified under A.R.S. 13-805 and precedent from **State v. Pinto**, 179 Ariz. 593, 880 P.2d 1139 (CA 1 1994).

State v. Dean, ____ Ariz. ____, 243 P.3d 1029 (CA 1 2010)

Defendant's lifetime probation was determined to be illegal under **State v. Peek**, 219 Ariz. 182, 195 P.3d 641 (2008), where the Court decided that convictions for attempted child molestation from 1994 to 1997 were not in a class of crimes where lifetime probation was available. The trial court, upon request of the adult probation office, vacated the lifetime probation term and ordered that the probation be subject to the maximum available, five years. The state appealed.

The court on review upheld the modification. It rejected arguments that modification was only available through postconviction proceedings under Rule 32 or modification proceedings properly initiated under Rule 27, Ariz. R. Crim. Pro. Finally, the court found no evidence or argument persuasive to show any of defendant's acts for which he was sentenced occurred beyond the time period found in **Peek** to be a time where lifetime probation was not available.

State v. Mason, 225 Ariz. 323, 238 P.3d 134 (CA 2 2010)

Defendant was sentenced to multiple terms of imprisonment for a variety of crimes.

On appeal the court set aside two sentences as imposed in violation of A.R.S. 13-116 and Double Jeopardy principles. Defendant had been convicted as an accomplice to aggravated assaults by two principals/co-defendants which occurred at the same time, albeit with two different weapons. Since there was but one assault at one time, consecutive sentences were not available.

State v. Petty, 225 Ariz. 369, 238 P.3d 637 (CA 2 2010)

Defendant pled guilty and successfully achieved partial postconviction relief in his “of right” postconviction filing after his sentence was originally imposed. Subsequently, he sought postconviction relief again alleging as a predicate for his claims the ineffective assistance of counsel he received in his first “of right” postconviction proceeding. The trial court dismissed the second petition as a “successive” petition that was barred by Rule 32.2(b), Ariz. R. Crim. Pro.

On review, the court held that since defendant was entitled to effective assistance of counsel in his “of right” postconviction proceeding, his allegation of ineffective assistance of counsel in that proceeding would allow him to overcome the preclusive bar of a successive petition. It remanded the case for further proceedings.

Schad v. Ryan, 595 F.3d 907 (9th Cir. 2010)

Schad challenged his 1985 death sentence for a 1979 homicide. The Ninth Circuit Court of Appeal remanded his habeas corpus case to the district court for a determination whether he had exercised diligence in attempting to present his claims for mitigation in state postconviction proceedings in the late 20th century. If diligence was not evident, his claim for relief could be denied.

Robinson v. Schriro, 595 F.3d 1086 (9th Cir. 2010)

Robinson challenged his death sentence for a 1987 homicide. On appeal from dismissal of his claim in federal district court the Court of Appeals found that the aggravating factor of especially heinous, cruel or depraved was not supported by the state court record. It further held that Robinson's sentencing counsel was ineffective for failing to conduct a proper investigation into Robinson's educational and family background for mitigation purposes. The court granted a writ for a new penalty phase trial in state court.

Stanley v. Schriro, 598 F.3d 612 (9th Cir. 2010)

Stanley challenged his death sentence for his conviction of the murders of his wife and five year old daughter in 1986. On appeal, the Court of Appeals found there was sufficient reason for an evidentiary hearing in the district court on Stanley's claim that his attorney provided ineffective assistance of counsel at the sentencing phase of his state court proceedings. The court found that while the insanity defense in the guilt phase was unsuccessful, the information and facts supporting it should have been more fully developed for sentencing, especially Stanley's history of substance abuse.

Detrich v. Ryan, 619 F.3d 1038 (9th Cir. 2010)

Detrich challenged his death sentence for his 1989 murder conviction of a woman he killed due to disagreement over purchased drugs. The Court of Appeals reversed the district court's dismissal of his claim for relief. The court found that Detrich was denied effective assistance of counsel at sentencing proceedings for failure to present evidence of neurological disorder and deficits.

Gonzales v. United States District Court, District of Arizona,
623 F.3d 1242 (9th Cir. 2010)

The Court of Appeals granted mandamus relief from the district court's refusal to stay habeas proceedings for Gonzales. An issue arose as to Gonzales' competency to assist his habeas counsel in his habeas corpus challenge to his 1991 murder conviction and resulting death sentence. The court held that Ninth Circuit precedent required a determination of a habeas petitioner's competency when a question arose as to competency. Consequently, the district court's refusal to stay the proceedings and order a competency determination warranted mandamus relief.

Williams v. Ryan, 623 F.3d 1258 (9th Cir. 2010)

Williams challenged his conviction for the 1991 murder of his former girlfriend and a resulting death sentence. The Court of Appeals reversed the district court's dismissal of his petition. The case was remanded back to the district court for a determination of whether non-disclosed letters suggesting that Williams was not responsible for the murder was material exculpatory *Brady* evidence warranting relief from the conviction.

Additionally, the court granted habeas relief on Williams' due process violation in sentencing claim. It ordered a new sentencing hearing in state court due to the state court's refusal to consider Williams' drug use as a mitigating factor. The state court found there was no nexus alleged between the crime and his drug use and refused to consider it as a mitigating factor. This was error as no nexus is required for mitigation to be considered at a capital sentencing

Holland v. Florida, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)

The Court reviewed a Florida death row inmate's habeas corpus petition which had been dismissed by the lower courts on a timeliness basis. The Court held that the one year statute of limitations for filing a

federal habeas corpus application is subject to equitable tolling. Here, the Court found that the inmates' attorney's failure to file a timely petition, failure to research the law on filing deadlines and failure to provide information to the inmate or communicate with the inmate for several years could be cause for equitably tolling the one year statute of limitations.

Magwood v. Patterson, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010)

The Court reviewed an Alabama death row inmate's petition and claims for habeas corpus relief. At issue was whether his petition was a successive petition containing successive claims which would be precluded due to his previous successful habeas petition allowing him a new capital sentencing proceeding.

The Court held that the inmate's petition was not a successive petition as it was a challenge to a resentencing previously granted by his prior habeas challenge. Though the petition also contained a claim that was available for review in his prior habeas petition, a "fair warning" claim that challenged the availability of a death sentence for his particular crime under Alabama law, he was not precluded from litigating such claim in his new petition as it was not deemed a successive claim under the statute.

Graham v. Florida, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)

The Court reviewed a natural life imprisonment sentence for a Florida juvenile offender who was so sentenced for a non-homicide offense. The Court held that the Eighth Amendment prohibits the imposition of a natural life sentence for a juvenile offender for a non-homicide offense.